

D.T.E. 02-81

Petition of Berkshire Gas Company for Approval of a Gas Purchase Agreement with BP Energy Company

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FOR: THE BERKSHIRE GAS COMPANY  
Petitioner

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COMPANY, AND ESSEX GAS COMPANY, each  
d/b/a KEYSpan ENERGY DELIVERY NEW  
ENGLAND  
Limited Participants

## I. INTRODUCTION

On November 27, 2002, the Berkshire Gas Company (“Berkshire” or “Company”), pursuant to G.L. c. 164, §§ 93 and 94A, submitted for approval by the Department of Telecommunications and Energy (“Department”) a Gas Purchase Agreement (“Purchase Agreement”) that the Company executed with BP Energy Company (“BP Energy”). The Purchase Agreement, dated November 1, 2002, replaces supply contracts between Berkshire and Dynegy Marketing and Trade (“Dynegy”) and between Berkshire and Aquila Energy Marketing Company (“Aquila”) pursuant to which Berkshire had been receiving domestic gas supplies since the early 1990s. The terms of the supply contracts with Dynegy and Aquila expired in June and September 2002. The Department docketed this matter as D.T.E. 02-81.

On January 23, 2003, pursuant to notice duly issued, the Department conducted a public hearing to afford interested persons the opportunity to comment on Berkshire’s proposal. An evidentiary hearing followed immediately thereafter. The Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention as of right, pursuant to G.L. c. 12, § 11E. The Department granted limited participation status to Boston Gas Company, Colonial Gas Company, and Essex Gas Company, each d/b/a Keyspan Energy Delivery New England. Berkshire sponsored the testimony of Karen L. Zink, vice president of Berkshire. The evidentiary record contains 24 exhibits. On February 10, 2003, the Attorney General filed a brief (“Attorney General Brief”). The Company filed its initial brief on February 12, 2003 (“Company Initial Brief”). The Attorney General did not file a reply brief. The Company filed its reply brief on February 19, 2003 (“Company Reply Brief”).

## II. DESCRIPTION OF PROPOSED AGREEMENT

### A. Purchase Agreement

The Company stated that the Purchase Agreement executed with BP Energy is the result of a competitive solicitation pursued by Berkshire to replace supply contracts with Dynegy and Aquila which expired in June and September 2002 (Exh. BG-1, at 3). The supply contracts with Dynegy and Aquila provided Berkshire with a maximum daily quantity ("MDQ") of 10,553 MMBtu per day of base load supply (id.). Under the Purchase Agreement, BP Energy will provide Berkshire with a base load supply of 10,553 MMBtu per day during the winter months of November through March, and 5,276 MMBtu per day during the summer months of April through October (Exhs. BG-1, at 8; BG-2, at 2-3). The Agreement is for a term ending on April 1, 2004 (Exhs. BG-1, at 8; BG-2, at 4).

According to Berkshire, BP Energy's production capacity is in excess of 5.0 Bcf per day (Exh. BG-1, at 9-10). The Company stated that BP Energy maintains substantial resources on several legs of the Tennessee Gas Pipeline ("TGP") system (id.; Tr. at 24-25, 40-42). The Company further stated that it is not aware of any instance where BP Energy has defaulted on any of its gas supply obligations to customers (Exh. DTE-1-7; see also Tr. at 22-23).

B. The Request For Proposals Process

On April 19, 2002, Berkshire issued a Request For Proposals (“RFP”) on a stand-alone basis for firm gas supply service to 11 potential bidders,<sup>1</sup> many of which were among the top 25 natural gas marketers by volume at the time of the issuance of the RFP (Exh. BG-1, at 5). Berkshire stated that the Company decided to seek a replacement supply for the expiring Dynegy and Aquila contracts on a stand-alone basis because there was no consortium body available with which Berkshire could negotiate to replace the Dynegy and Aquila contracts (Exh. DTE-1-1).

The Company stated that the main objective of the RFP was to provide reliable and least-cost gas supply service to the Company’s customers (Exh. BG-4, at 2). The required MDQ was 10,553 MMBtu per day (plus fuel loss requirements) during the winter period of November 1 through March 31, and approximately 50 percent of this amount (i.e., 5,276 MMBtu per day) during the summer period of April 1 through October 31 (id. at 4). Berkshire encouraged bids that maintain appropriate levels of supply reliability, diversity, and flexibility through gas supply contracts that have provisions to meet the Company’s fluctuating weather-related firm demand requirements, as well as bids with multiple pricing options or for winter-only service (Exh. BG-4, at 2; Exh. BG-1, at 6).

Berkshire gave bidders the opportunity to ask questions or seek clarification of the RFP’s objectives (Exh. BG-1, at 6). The deadline for the submission of bids was May 3, 2002

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<sup>1</sup> The bidders include Adams Resources Marketing, Ltd., Amerada Hess Corp., Anadarko Energy Services Co., Aquila Energy Marketing Co., BP Energy Co., Coral Energy Resources, L.P., Duke Energy Trading and Marketing, L.L.C., Dynegy Marketing and Trade, ExxonMobil Gas Marketing Co., Mirant Americas Energy Marketing, L.P., and Texaco Natural Gas (Exh. BG-5).

(id. at 5). At the close of the solicitation process only four suppliers submitted bids (id. at 6).<sup>2</sup> Berkshire states that the Company selected BP Energy as the winning bid based on a comprehensive evaluation of price, reliability of supply, and the bidder's credit quality; demonstrated experience in providing gas supply service; production resources; and resources on the TGP system (Exhs. BG-1, at 5-7; BG-4, at 6-9; DTE-1-3).

### III. POSITIONS OF THE PARTIES

#### A. Attorney General

The Attorney General asks the Department to reject the Purchase Agreement (Attorney General Brief at 1). The Attorney General contends that by contracting for domestic gas supplies with just one supplier, BP Energy, Berkshire has failed to comply with the Department's directive in Berkshire Gas Company, D.T.E. 01-41, at 12 (2001), which the Attorney General argues "directed the Company to negotiate and contract with more than one supplier" (id. at 2, citing D.T.E. 01-41, at 12; Commonwealth Gas Company, D.P.U. 94-174-A, at 27 (1996)). The Attorney General further argues that Berkshire has been unable to explain adequately how a single supplier meets the Company's objective of supplier diversity, especially considering other favorable responses to the Company's Request for Proposal (id. at 2, citing Exhs. AG-1-2, AG-1-5, AG-1-6, AG-1-7; Tr. at 19-21, 23-24).

The Attorney General also asks the Department to reject the Purchase Agreement on the grounds that a complicated business relationship exists between Berkshire and BP Energy under

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<sup>2</sup> These suppliers are Anadarko Energy Services Co., BP Energy Co., Duke Energy Trading and Marketing, L.L.C., and Mirant Americas Energy Marketing, L.P. (Exh. BG-6).

the gas portfolio optimization agreement (id. at 1). The Attorney General notes that, under the gas portfolio optimization agreement, BP Energy shares in each dollar “saved” in the purchasing and dispatching of Berkshire’s domestic gas portfolio (id. at 2). Therefore, the Attorney General argues, the Purchase Agreement is not an arm’s length transaction and should be rejected (id. at 1). In the alternative, the Attorney General requests that the Department order that the Company either (1) immediately begin negotiations with other favorably ranked RFP respondents in order to obtain at least one other source of supply, or (2) issue another RFP which divides the Company’s supply requirements into two or more equal amounts (id. at 2).

B. Berkshire

Berkshire explains that the decision to select BP Energy as the winning bid was based on both price and non-price factors as indicated in the RFP (Company Initial Brief at 6-8; citing Exh. BG-4, at 4-9). Berkshire contends that while the pricing terms of some of the other bidders were comparable to those offered by BP Energy, BP Energy’s proposal addressed all of the Company’s non-price concerns (id. at 8). As such, the Company claims that it stands to receive more from BP Energy for essentially the same cost (id., citing Tr. at 20). The Company claims that the availability of BP Energy’s substantial production resources for delivery on all legs of the TGP system and the fact that BP Energy is the largest producer and reserve holder in North America will provide Berkshire with reliability and diversity benefits consistent with the Company’s portfolio objectives (id. at 8).

Berkshire maintains that the Purchase Agreement is consistent with the public interest because it contributes to a least-cost resource portfolio consistent with the Company's portfolio objectives (id. at 11, citing Exh. BG-1, at 8). The Company explained that the Purchase Agreement with BP Energy provides several benefits to its customers (id.). First, by securing a replacement base-load supply resource for the expiring Dynegy and Aquila contracts, Berkshire will be able to continue to provide reliable service to its customers (id.). Second, Berkshire contends that the competitive solicitation pursued by the Company helped it to secure a least-cost replacement supply with attractive pricing provisions and flexible contract terms (id. at 5-9, citing Exhs. BG-1, at 9; DTE-1-4).

Berkshire argues that the "reasonably available" standard in reviewing resource procurement should not be used as a justification for a narrowly defined and limited market examination (Company Initial Brief at 9, citing Commonwealth Gas Company, D.P.U. 94-174-A, at 27). Furthermore, the Company argues that the Department evaluates the acquisition of a new gas resource to determine whether the acquisition satisfied the Company's non-price objectives including, but not limited to, flexibility of nominations, and reliability and diversity of supplies (id. at 10, citing D.P.U. 94-174-A, at 29). In addition, the Company maintains that the price and non-price attributes of each commodity contract should contribute to the strength of the overall supply portfolio (id. at 10, citing D.P.U. 94-174-A, at 28). Therefore, the Company argues, a mechanical application of forced diversity, i.e., the



requirement that the Company's base load supplies be secured from more than one supplier, would in this instance frustrate the goal of achieving enhanced supply reliability (id. at 10).<sup>3</sup>

Berkshire requests that the Department reject the Attorney General's argument that the Purchase Agreement with BP Energy was not an arm's length transaction and therefore should not be approved (Company Reply Brief at 4). The Company asserts that because Berkshire and BP Energy are not affiliates under either the Securities and Exchange Commission definition of "affiliate" or the Department's Standards of Conduct, the Attorney General's argument has no basis (id. at 3). Further, Berkshire argues that the terms of the Company's existing alliance with BP Energy with respect to the optimization of the resource portfolios of Berkshire and certain of its own affiliates provides no basis for favoritism toward BP Energy (id. at 3). To the contrary, the Company claims that the existence of the alliance weighed against BP Energy in the course of Berkshire's review of the various proposals (id. at 4).

Berkshire argues that it has demonstrated that its RFP process was fair, open, and transparent, and that no bidder objected to the process or asserted that it was unfairly excluded from consideration or that its bid was unfairly evaluated (Company Initial Brief at 9). The

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<sup>3</sup> Berkshire explains that the Company has an extremely flexible resource portfolio that would facilitate its ability to maintain reliable service in the "extremely doubtful" circumstance where BP Energy is not able to meet its contractual obligations. Berkshire notes that its existing contractual relationship with a local cogeneration facility can provide in excess of 30,000 dekatherms per day for the Company's use. In addition, the Company has a new liquified natural gas ("LNG") plant, which, together with its peak service resources, such as liquid propane and storage resources, could contribute to the Company's ability to provide reliable service to customers (Company Initial Brief at 10 n.5, citing Tr. 24-25, 41-42; Berkshire Gas Company, D.T.E. 02-17, at 44 (2003)).

Company claims that BP Energy offered the best price, reliability and diversity benefits, superior credit quality<sup>4</sup> and substantial resources on the TGP system (id. at 8, citing Exhs. BG-1 at 10; DTE-1-3; DTE-1-7; Tr. at 19). Furthermore, Berkshire argues that the BP resource advances the fundamental goal of enhanced reliability, consistent with the Company's portfolio objectives (id. at 8).

Finally, Berkshire contends that it has demonstrated that the RFP process was open, fair, and transparent, and that it was appropriately conducted; that the Purchase Agreement with BP Energy contributes to a least-cost portfolio consistent with the Company's portfolio objectives; and that the Agreement is consistent with the public interest (Company Initial Brief at 9-11). Accordingly, the Company requests that the Department approve the Purchase Agreement (id. at 11-12).

#### IV. STANDARD OF REVIEW

In evaluating a gas utility's resource options for the acquisition of commodity resources as well as for the acquisition of capacity under G.L. c. 164, § 94A, the Department examines whether the acquisition of the resource is consistent with the public interest. Commonwealth Gas Company, D.P.U. 94-174-A at 27 (1996). In order to demonstrate that the proposed acquisition of a resource that provides commodity or incremental resources is consistent with the public interest, a local distribution company ("LDC") must show that the acquisition (1) is consistent with the company's portfolio objectives, and (2) compares favorably to the range of alternative options reasonably available to the company and its customers, including releasing

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<sup>4</sup> BP Energy has a Standard and Poors rating of AA+ (Exh. BG-1, at 10).

capacity to customers migrating to transportation, at the time of the acquisition or contract negotiation. Id.

In establishing that a resource is consistent with the company's portfolio objectives, the company may refer to portfolio objectives established in a recently approved resource plan or in a recent review of supply contracts under G.L. c. 164, § 94A, or may describe its objectives in the filing accompanying the proposed resource. Id. In comparing the proposed resource acquisition to current market offerings, the Department examines relevant price and non-price attributes of each contract to ensure a contribution to the strength of the overall supply portfolio. Id. at 28. As part of the review of relevant price and non-price attributes, the Department considers whether the pricing terms are competitive with those for the broad range of capacity, storage, and commodity options that were available to the LDC at the time of the acquisition, as well as those opportunities that were available to other LDCs in the region. Id. In addition, the Department determines whether the acquisition satisfies the LDC's non-price objectives, including, but not limited to, flexibility of nominations and reliability and diversity of supplies. Id. at 29.

## V. ANALYSIS AND FINDINGS

### A. The Request For Proposal Process

The bid solicitation and evaluation process followed by Berkshire in this proceeding was similar to the processes approved in recent proceedings. See, e.g., Berkshire Gas Company, D.T.E. 02-56, at 6, 9-10 (2002); Berkshire Gas Company, D.T.E. 02-19, at 11 (2002); Berkshire Gas Company, D.T.E. 01-41, at 14 (2001); Berkshire Gas Company, D.T.E. 99-81,

at 3-5 (1999); Boston Gas Company, D.T.E. 99-76, at 20-22 (1999). In determining whether the RFP process was fair, open, and transparent, the Department determines whether potential bidders were notified on the specifics of how each bid would be evaluated. We note that the Company clearly disclosed the evaluation process and evaluation criteria to each potential bidder, and there was an opportunity for bidders to request clarification from the Company on both the evaluation criteria and the RFP process itself. The Company evaluated and selected the winning bid based on the criteria set forth in the RFP. Thus, the Department finds that the RFP process was transparent.

There is no evidence that any potential bidder objected that it was unfairly excluded from initial consideration, or that a bid was unfairly evaluated. Accordingly, the Department finds that the RFP process was fair and open. Having found that the RFP process was conducted in a fair, open, and transparent manner, the Department approves the RFP process as appropriately conducted. Finally, our review of the responses to the RFPs indicates that the Company's proposal compares favorably to current market offerings, considering price and non-price factors, as well as current market conditions facing the Company at the time of the execution of the Agreement.

B. Purchase Agreement

The Department's review of the competitive solicitation process which led to the selection of BP Energy as the winning bid indicates that Berkshire obtained a least-cost replacement resource consistent with the Company's portfolio objectives. The BP Energy resource compares favorably to the range of alternatives reasonably available to the Company

and its customers at the time of the agreement. Additionally, the Department's review of Berkshire's proposal indicates that the Purchase Agreement is consistent with the Company's resource portfolio objectives established in the Company's most recent forecast and supply plan in Berkshire Gas Company, D.T.E. 02-17 (2003). The contract gas supply volumes are consistent with the Company's most recently approved forecast and supply plan and replace contracts that have recently expired.

We acknowledge the Attorney General's concern that Berkshire has failed to comply with previous Department directives by contracting with only one supplier. In D.T.E. 01-41, at 12, we directed the Company "to issue an RFP and to negotiate gas supply agreements with various suppliers." The Department anticipated at the time that Berkshire would replace the expiring Dynegy and Aquila contracts with two similar contracts. The Company has demonstrated, however, that replacing the expired Dynegy and Aquila contracts with a single contract with BP Energy would, in comparison to the reasonably available alternatives, provide benefits sufficient to warrant an exception to our previous directive to the Company. The Company has demonstrated that a single supplier is appropriate in this instance because the contract enables Berkshire to transport supplies on any of the three legs of the TGP system, which enhances the Company's ability to provide reliable and uninterrupted service to its customers. Furthermore, for a company of Berkshire's relatively small size, and given the total volume of gas involved, contracting with a single supplier with diversified supply resources provides significant economies of scale to the Company and its customers compared to having two or three separate contracts for gas delivery on only one leg of the TGP system. Moreover,

BP Energy's substantial production capacity and reserve holdings in North America greatly reduce the likelihood that BP Energy will default under the Agreement (Tr. 24-25). However, should BP Energy default in its supply obligations under the Agreement for any reason, the Department notes that Berkshire has a contingency plan to serve customers (Tr. 41-42).

We further note that the Company's resource portfolio is not entirely dependent on BP Energy, but is diversified because it includes other gas supply contracts with EnCana (a Canadian resource), DOMAC, and Altresco. Berkshire Gas Company, D.T.E. 02-17 (2003); Berkshire Gas Company, D.T.E. 02-56 (2002); Berkshire Gas Company, D.T.E. 01-41 (2001). We have found that Berkshire's RFP process was consistent with D.T.E. 01-41 in that the Company sought bids from eleven potential bidders and considered four bids. The Company's decision to accept only BP Energy's bid does not render the Purchase Agreement inconsistent with the Company's portfolio objectives or demonstrate that the Purchase Agreement does not compare favorably to the range of alternative options reasonably available to the Company.

We clarify that in reviewing gas purchase agreements, the Department reviews the relevant price and non-price factors, "including, but not limited to, flexibility of nominations, and reliability and diversity of supplies." D.P.U. 94-174-A, at 28-29. The diversity of the Company's supplies is only one of several factors that the Department considers. We take into account prevailing market conditions, company size, the total volume of gas involved, and an LDC's entire resource portfolio in reviewing whether a particular gas purchase contract

provides sufficient supply diversity. In sum, the Department's intent concerning diversity of supplies is to ensure that companies will provide reliable and uninterrupted service.

With regard to the Attorney General's other concern that the Purchase Agreement between Berkshire and BP Energy is not an arm's length transaction because there exists a business relationship between the two parties under the gas portfolio optimization agreement, the Department notes that, despite ample opportunity to elicit evidence to support this argument in discovery and during cross-examination, there is no substantial evidence of record to suggest that the existing business relationship between Berkshire and BP Energy influenced the evaluation of the bids submitted to the Company or the selection of BP Energy as the winning bidder. As mentioned earlier, there is no evidence that any potential or actual bidder objected that its bid was unfairly excluded from initial consideration or that its bid was unfairly evaluated. Moreover, since Berkshire and BP Energy are not affiliates, as defined by G.L. c. 164, § 85, the Department's Standards of Conduct, 220 C.M.R. § 12.01 et seq., do not prohibit them from entering into the Purchase Agreement.

Accordingly, we find that the Attorney General's request to reject the Purchase Agreement on the grounds that Berkshire contracted with only one supplier is not justified. We therefore reject the Attorney General's suggestion to order the Company either to commence negotiations with other favorably ranked RFP respondents in order to obtain at least one other source of supply, or to issue another RFP which divides its supply requirements into two or more equal amounts. Because the Department finds that the Purchase Agreement is consistent with the Company's portfolio objectives and compares favorably to the range of alternative

options reasonably available to it, we find that the Purchase Agreement is consistent with the public interest, and we approve the Company's proposal.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is hereby

ORDERED: That the Gas Purchase Agreement between Berkshire Gas Company and BP Energy Company is APPROVED.

By Order of the Department,

\_\_\_\_\_/s\_\_\_\_\_  
Paul B. Vasington, Chairman

\_\_\_\_\_/s\_\_\_\_\_  
James Connelly, Commissioner

\_\_\_\_\_/s\_\_\_\_\_  
W. Robert Keating, Commissioner

\_\_\_\_\_/s\_\_\_\_\_  
Eugene J. Sullivan, Jr., Commissioner

\_\_\_\_\_/s\_\_\_\_\_  
Deirdre K. Manning, Commissioner



Appeal as to matters of law from any final decision, order, or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order, or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order, or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5 Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).